obligation" (p.34). Given that the ability of the employer to accommodate, Justice Wilson said, was obvious and "incontrovertible" and that Mr. Christie's employer could not prove accommodation to the point of undue hardship, Mr. Christies' appeal was allowed.

In summary, what these three cases related to the issue of BFOQ in Canada today establish is a broader scope of obligation for employers. Originally, once a BFOQ was accepted as a defence that defence was absolute. Having established, that is, that a given group were not suitable for employment, no further argument could be raised by an employee. It was a total defence.

By recognizing adverse effect discrimination and creating an obligation by an employer to accommodate employees to the point of hardship, the Supreme Court of Canada has, in fact, enlarged the obligation of employers and narrowed the circumstances wherein a BFOQ will be accepted. Employers in Canada must now examine so-called neutral rules for employees and see if, in fact, those rules have a particularly adverse impact on some employees. If so, employers will have the obligation of accommodation of employees up to the point of hardship for themselves.

As is noted by Pentney (in Tarnopolsky, 1991, p.29):

> Generally, human rights codes aim at the elimination of actions based on stereotypes. Individualized assessments are required rather than decisions based on stereotypes about groups. After O'Malley it is clear that identical treatment is not necessarily equal treatment if it fails to account for relevant differences. Rules which are neutral in their face but which have an adverse effect on an individual or group protected by the legislation can be challenged under the O'Malley doctrine. In such a case an employer must prove first that the rule is rationally related to job performance, and then show it cannot accommodate the needs of the individual employee without undue hardship. This requires an individualized assessment.

Summary

In summary, this chapter has examined the Charter and who is restrained by it. At the present time universities are not restrained, whereas community colleges and technical institutes are. Section one of the Charter allows for a protection of societal interests, where appropriate and necessary, over the rights of individuals. Section 28 ensures that women's rights under the Charter are the same as men's. Finally, the chapter has examined how the Supreme Court of Canada has adjudicated on the gender issues of discrimination because of pregnancy and harassment. A contrast was made between pre-Charter judgments on these issues and post-Charter judgments on the same issues to show how the Charter has changed the attitude of the court towards human rights. In the words of the Supreme Court of Canada, the Charter "must be regarded as a "new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection". (R. v. Therens, (1985), p.613)

> The preceding considerations are amply sufficient to show that custom, however universal it may be, affords in this case no presumption, and ought not to create any prejudice, in favour of the arrangements which place women in social and political subjection to men. But I may go further, and maintain that the course of history, and the tendencies of progressive human society, afford not only no presumption in favour of this system of inequality of rights, but a strong one against it ... this relic of the past is discordant with the future, and must necessarily disappear.

John Stuart Mill, "The Subjection of Women" (1869), in Rossi, A. (1970) Essays on Sex Equality, Chicago: University of Chicago Press, 142.

CHAPTER IV

Affirmative Action - Necessary But Not Sufficient

The Growth of Employment Equity

Having examined the origins of human rights legislation, the process by which it is effected, and the impact of the Charter on its interpretation, it is necessary to consider the development in law of an alternative to the human rights process, namely employment equity or affirmative action.

The human rights complaint process, as outlined in Chapter II, had a number of inherent problems worthy of a brief review at this juncture. First, it is re-active rather than pro-active, responding only when complaints are made. That presupposes a number of factors already referred to in Chapter II, such as employees being knowledgeable of the human rights process and of their right to complain, as well as being sufficiently confident of job security that they do not feel intimidated about complaining.

Second, it is based on a perception that problems of discrimination are individual in nature, a problem of one individual which should lead to a remedy for that one individual. As was noted in Action des Femmes, however, discrimination, where it exists, is often systemic in nature, involving biased preconceptions about limitations in the abilities and capacities of whole groups, simply because they are members of a given group, be they female or native (See also Abella, 1989). Clearly, such discrimination requires remedies for the group in question, not merely for individuals.

Third, as was also discussed earlier, there are problems with the process itself. Human rights commissions may be under-staffed, operating on too low a budget to function effectively, and linked too closely through commission appointments to the carrying out of a particular government agenda, as opposed to being committed to a true investigation of the merit of a case.

Fourth, as a result of the above mentioned problems, employers may be contemptuous of the rules in question, feeling that actual challenges of discriminatory practices will not occur, and that if they do, they can respond to them as individual problems with relatively little cost, effort or embarrassment on their own part.

Employment Equity Legislation

As of 1992, the Federal government and eight provinces have some form of employment equity legislation. The Federal Employment Equity Act (1986) can be used as an example of such legislation. The Act, under S.1, recognizes four "designated groups" in need of special assistance. They are: women, aboriginal peoples, other visible minorities and the handicapped. The Act requires that all crown corporations and federally regulated employers with more than 100 employees prepare and file with the Minister of Employment and Immigration an annual report setting out the employment situation of the aforementioned "designated groups".

Affected employers must first do an analysis of their organization, i.e. how many of the four designated groups work for the company. If members of those groups do work for the company what is their job status within the company, their pay level or salary range and their opportunity for promotion or advancement. Lastly, when the company hires or fires individuals, how many members of the four affected groups are included, and in what ways are members of the four designated groups affected.

The whole purpose of such analysis is to go behind "motherhood" statements of non-discriminatory intent by corporations, and to reveal actual patterns of systemic discrimination by the companies in question. Having revealed their own discriminatory practices, employers must then identify and eliminate discriminatory practices within their companies and must implement:

> ... such positive policies and practices and making such reasonable accommodation as will ensure that persons in designated groups achieve a degree of representation in the various positions of employment with the employer. That is, at least proportionate to their representation:
>
> (i) in the work force, or
>
> (ii) in those segments of the work force that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw or promote employees (S.4).

In other words, what is sought, ideally, is representation of the designated groups in given jobs proportionate to their number within the work force. Thus, it might be expected that the numbers of native people or handicapped individuals, hired or promoted, could be relatively small, given their proportionate number within the population. The number of women, on the other hand, could be expected to be significant.

It is not sufficient to make an attempt to eliminate discrimination; every year, when reporting, employers must establish a timetable, showing what they intend to achieve in the coming year or years to which their plan relates. This requirement is meant to ensure that plans are actually put into practice, and that improvement should therefore be seen from year to year.

One of the strongest criticisms of the Employment Equity Act, at this point in time, is the lack of any suitable enforcement provision. Collecting information serves to disclose discriminatory patterns, but does not ensure any change to those patterns. What the Act needs are provisions providing for penalties in case of non-compliance. Provisions for inspection are also necessary, as without inspection, there may be no evidence of non-compliance. Without such amendments the Act may be seen as a technical rather than a substantive requirement.

The Federal Contractor's Program

Accompanying the federal Employment Equity Act was a new federal Contractor's Program of contract compliance, which came into effect on September 1, 1986. The program is administered by the Canadian Employment and Immigration Commission (C.E.I.C.). It requires employers who wish to be considered for certain contracts with the federal government to sign a Certificate of Commitment to Employment Equity. Firms which are affected are those with at least 100 employees, bidding on a contract with the Federal government worth at least $200,000.

The program establishes eleven criteria to assist employees in meeting their objectives of creating and maintaining employment equity. Basically it puts those who fall under it in a position very similar to those who fall under the Employment Equity Act. Employers must analyze their work force to see where discriminatory practices may exist, and must then set goals for the elimination of those practices. Furthermore, participating contractors must open their firms to a review, or inspection. Various Canadian firms have thus far lost contracts pursuant to investigations, where it has been disclosed that they are not implementing change in the manner that they claimed they would.

Affirmative Action - The Charter

It is clear, from the description given thus far, that employment equity involves treating some people differently from others and may therefore be seen to be in breach of S.15(1) of the Charter. Section 15(2) of the Charter, however, specifically addresses this issue. Section 15(2) reads as follows:

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15(2) recognizes that laws which provide for the special treatment of disadvantaged individuals, in order to put them in a truly competitive position are different than laws which "deny benefits" or "impose burdens" on those who should be similarly situated to each other.

This section in the Charter should ensure that the same sorts of challenges to affirmative action that have arisen in the United States should not arise in Canada. Parliament in Canada has made clear that true equality may only be achieved in some circumstances by not treating everyone identically, but rather by extraordinary or protective advantage for some groups where necessary.

Affirmative Action vs. Human Rights

Given flaws in the human rights system which employment equity legislation has sought to address, an obvious issue which arises is whether human rights legislation will continue to serve any useful purpose or whether, given its problems and its flaws, it should not simply be replaced by affirmative action. From the perspective of truly attempting to limit discrimination the answer must be no.

While human rights legislation remains inadequate to address systemic discrimination, so too does affirmative action remain inadequate to address either discrimination aimed at particular individuals, such as in cases of sexual harassment, or discrimination in instances where so called neutral rules impact severely on certain groups because of their beliefs, such as the religious groups examined in Chapter III. For those cases, the older human rights concept of an individual laying a complaint, and of an investigation of, and a remedy for that particular problem seems more appropriate. Thus, affirmative action and human rights can best be seen as complementary rather than competitive remedies working in conjunction with each other to address different issues of discriminatory behaviour.

Gender Discrimination in Post-Secondary Education

Administrators of post-secondary educational institutions need to be aware of gender discrimination issues from two distinct perspectives - that of female staff and that of female students. Some issues will be the same for the two groups and some will impact more on one group than the other.

Some of the most pertinent issues for an administrator to consider would be: employment equity and proportionate representation, pay equity, sexual harassment and the existence of women's programs and women's studies. Institutional recognition of, and attitude towards, the above issues plus a willingness to examine gender bias both within teacher attitude and the course content of courses taught, say a great deal about where that institute truly stands on issues of discrimination.

Employment Equity and Proportionate Representation

This is one of the most difficult and volatile of the gender issues that administrators must address. It is difficult for a number of reasons. During the rapid expansion of the university in the nineteen-sixties, universities became staffed predominantly with white males. For a number of these tenured staff members, affirmative action is seen as an affront, as a kind of discrimination against individuals such as themselves. Indeed, some individuals do not become aware of discriminatory practices until or unless they perceive themselves as being the victims of such practices and then they exhibit unusual sensitivity.

A second feature which makes employment equity particularly difficult is that when proportionate representation is called for under affirmative action, women constitute by far the largest group who have not, historically, been proportionately represented in educational institutions in Canada. Thus, the magnitude of the reparation is greatest where women are concerned (See: Women's Wages, 1992).

A third feature which makes this issue volatile is that compliance, in most cases where it is being sought, is mandated by legislation. Thus, at the University of Alberta, Edmonton, for example, where an acrimonious debate of the merits (or lack thereof) of affirmative action has been waged; it is a lost battle on the part of those who oppose it, as the University must either comply with the Federal Contractor's program or lose some of its research funding (not an attractive option while post-secondary budgets are shrinking).

For all these reasons, affirmative action remains the focus point which attracts both the most visible anger and the most visible opposition on the part of those who oppose gender equality. (It may also, obviously, be opposed by some who believe in gender equality, but who resent its "forcible" application through federal intervention in provincial jurisdiction over education.)

Pay Equity

Pay equity goes further than the concept of equal pay for the same work and attempts to examine how work is appraised and valued, in order to achieve more equitable forms of evaluation, as captured by the phrase "equal pay for work of equal value". Pay equity is comparable to the American term of "comparable worth". To quote Milkovitch (1984, p.26):

> Equal work and work of comparable worth represent very different standards on which to base pay. Equal work, a standard underlying contemporary compensation systems, has a reasonably well-accepted interpretation in labour-management relations, within the judicial system and among compensation experts. By contrast, the notion of comparable worth does not have as clear a definition and perhaps therein lies some of the confusion and concern. Comparable worth appears to take on different meanings to different people. It seems to have become a rallying cry for those who perceive the "earnings gap" as an example of the social injustice present in the United States society. For others, comparable worth is a behavioral or social science akin to "organizational climate" or "quality of working life" for which researchers may attempt to develop measures and conduct investigations.

Pay equity requires, in other words, that bias or discrimination should be eliminated as a factor in determining the relative worth of particular types of work. One aspect of employment discrimination which is of concern to women is that they tend to be predominant in certain occupations wherein they are paid less than men are in the occupations in which men predominate. Furthermore, it is felt that women have congregated within a narrow range of professions based at least in part on "occupational discrimination of a systemic nature" (Kelly, 1988, p.4). As a result, wages are seen as being artificially depressed for women who are in those occupations where women predominate.

Pay equity postulates, then, that since discrimination depresses women's wages, intervention in the form of pay equity is necessary to counter that discrimination. As Kelly (1988, p.4) puts it:

> That intervention is in the form of a gender bias - free job evaluation. It measures the comparable worth of female-dominated jobs to male-dominated jobs with respect to their intrinsic internal value to the employee in a given work establishment.

As of May, 1992, pay equity is law in the federal government and in all but the three western provinces, Saskatchewan, Alberta and British Columbia. Ontario is unique inasmuch as it is the only province with pay equity laws affecting small businesses (any company with more than ten employees). Pay equity is not, in and by itself, a solution to gender discrimination on the job. It is seen however, as one of the tools with which to address it.

As Martin Harts (1992, B8) observes

> ... as cumbersome and costly as pay equity may be, your daughters and their daughters will probably thank you some day - particularly if they end up working in female dominated jobs.

In post secondary education, pay equity has not attracted the same level of hostility as affirmative action, very probably since the primary impact would be on service and support staff, where, for example, the work of a secretary and that of a laboratory assistant may be compared. Where women have achieved teaching or administrative positions, they receive the same compensation as their male counterpart. For women in post-secondary education the basic problem is being denied entry to the teaching and administrative positions which men continue to dominate, and of being assigned to the "low pay-off" jobs when they do gain access.

Sexual Harassment

Few would disagree that educational institutions must define and address issues of sexual harassment. Accepting that principle, however, is much easier than agreeing on a definition of what harassment is and of appropriate response to particular instances of harassment.

In Chapter III the case of Janzen v. Platy Enterprises Ltd. (1989) was cited as offering the Supreme Court's definition of harassment, as encompassing two different situations. One type of harassment involves either the threat of punishment or the promise of advantage in return for sexual favours (referred to as the quid pro quo type of harassment by the Americans). The other type of harassment may involve off-colour comments, propositions, even a display of sexually explicit material (this could be referred to as harassment by the creation of an offensive or oppressive atmosphere).

Regarding both types of harassment, Chief Justice Dickson said

> ... I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. ... When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being. (pp.298-299)

Most administrators undoubtedly cringe at the idea of blatant harassment by either their administrative staff or their instructional staff. Such events may attract critical media coverage and lead to considerable community censure. As discussed in Chapter III (p.60), it is crucial that educational institutions develop their own policy with regard to sexual harassment. By so doing they will be able to mitigate or minimize damages if they are sued pursuant to an incident of harassment. Nor is it sufficient to have a policy. Institutions must adhere to their own rules. To not do so is to invite a situation where a serious incident of harassment may occur, and it is disclosed that there were prior incidents which were inadequately or inappropriately dealt with. This would both leave an institute open to increased liability and, if publicized, leave an impression of mismanagement.

The Existence of Women's Studies Programs

Within a post-secondary education institution, two things should be noted: first, whether there is a women's studies program and second how well supported and funded such a program is. The importance of such programs is at least three-fold. First, it recognizes intrinsic merit or value in the subject itself and gives women and men who are in universities an opportunity to study the subject. Second, it conveys both to the rest of the university and to those outside the university that the program is seen as worthy of institutional support. Third, it offers an obvious focal point for the spearheading of curriculum assessment and modification outside of women's studies courses themselves.

Institutional Recognition of and Attitude Toward These Issues

Educational institutions in Canada, unlike other government employees, cannot simply stop with an implementation of employment equity rules. They should be engaged in role modelling: allowing female staff to realize potential, allowing both female and male students to see women competently performing their teaching or administrative functions, and allowing those outside the university to see these developments unfold. If universities cannot act as models in attempting to achieve fairness or equity for women and racial minorities, they will have abdicated leadership, the right to which may not be regained.

For any of the aforementioned programs to be viable, support from the very top of the institution, the Board or Senate, as well as the president, is crucial. If top administrators equivocate, many of those below senior level who do not support employment equity will see backing for their views and will resist change more. If those same senior administrators, however, were to show by both word and action their commitment to the objectives of employment equity, most staff will accept the inevitable. Neil Gaigan, director of the federal contractors program is quoted as saying:

> Good programs take commitment, not just to the objective - it's really easy to say you're committed to the idea of equal opportunity - but I mean you really need to be committed, willing to devote resources, manpower, dollars, everything. That's what the University of Calgary has done (Fitterman, 1992, pp.E1-E2).

Gender Bias Within Curriculum and Teacher Attitude

This issue, like employment equity, is one which may attract resistance both at the administrative and the instructional level. The starting place is recognition by staff of their own subjectivity in the choice of curriculum and how that may lead to a total exclusion of some material, or at very least to a distortion of what is presented.

Without an acknowledgement of the role bias plays in curriculum choices, those choices must remain unexamined and unchallenged (See Fraser, 1992). Those who would advocate modification, in most instances do not suggest a whole rewriting of existing curriculum, rather the plea is for sensitivity to alternate views. A simple example of gender bias would be the view historically inculcated in junior high school that girls would study household economics, while boys would study shop. This model was retained at the post-secondary level, where very few women trained in the trades. When an example of a tradesperson was used in a book or illustration, that example was almost inevitably male. Such educational "modelling" undoubtedly had a powerful effect on dissuading women from considering the trades as a career option.

In criticizing curriculum, however, the whole message and meaning of that curriculum must be kept in mind.

As noted in Gaskell, McLaren and Novogrodsky (1980, p.38)

> What is important is the ideology that underlies the images and the facts that are brought together in the curriculum. The underlying assumptions and story lies in the curriculum - what is being said about those images and characters - these should be the subject of our critique. The number of male and female characters, the number of male and female doctors, the number of men and women baking cookies, can tell us something important. But only in context, only in the light of the narrative, and its underlying message.

The teaching of law offers another example of gender bias in curriculum. Some areas of law, such as contract, raise relatively few gender issues, while other areas raise a number. For example, in teaching land law and the division of assets in case of divorce, it is relevant to understand how assets were divided before the passage of contemporary legislation, and how gravely disadvantaged women were in divorce proceedings by questions as to what their monetary contribution to the union had been. Furthermore, such questions tie in with employment equity, since if women were to be compensated according to their earnings, it seems relevant to ask what those earnings could reasonably have been, given wage disparities between men and women working in Canada (Canadian Press, 1992, p.A3).

Nor does it suffice to simply examine the content of the law. It is necessary to look also at the structure of the justice system, not only at how many women have practised law, but, more important, how many women have been involved in the process of creating legislation as politicians, and how many women have interpreted the law as judges. Without a substantial female presence, it would seem strange to assume an equal representation of the female perspective or bias on legal issues. In Alberta, for example, of the 83 members of the legislative assembly, only 12 are women. (Unland, 1992, p.A1)

It is interesting to note that in a recent survey of the law profession within Alberta conducted by the Alberta Law Foundation, there are quite startling figures on the amount and kinds of bias suffered by women practising law within the province. Over 81% of the women surveyed and 42.4% of the men surveyed felt that gender bias affected the career advancement of female lawyers, for example. These perceptions, from within the legal profession itself, indicate that Alberta's legal profession still has a long way to go to address gender discrimination within its own ranks. (Brockman, 1992, p.38)

One of the great merits and challenges of affirmative action related to curriculum, is that by introducing more women (as well as racial minorities and the disabled) to the workplace, curriculum content will come under increasing review and criticism by those who feel either unrepresented or misrepresented by existing material. Hopefully this will be treated as a challenge which may lead to a broadening of perspective by instructors and an enrichment of their present curriculum.

As stated by Taylor Cox, Jr. (1992, 142):

> A primary reason that we have failed to capitalize on the richness of diversity in our work force is that learning is too often one-way. The new recruit learns how to fit in to the organization, but what is the organization to learn from the new recruit.

The same concept is surely true for educational institutions.

Nor does it suffice for teachers to include in their curriculum material offering alternative views on gender issues, if those teachers then omit teaching or discussing those same issues. Some students readily perceive inability or unwillingness to address the controversial; others will emulate what they perceive to be their teachers informed and therefore correct view. It is hard to say which is more unfortunate. John P. Fernandez (1992), writing within a corporate context, states:

> Inroads (a training program) would be more successful if it taught its students the realities and frailties of corporate America. It should teach them how detrimental racism, sexism, ethnocentricism, homophobia, religious biases, and ageism are to organization effectiveness and competitiveness and how costly they are to the bottom line. Teach the students they all have some of these ism's and, although they may sometimes be the victim, they also victimize. Teach them how to change their isms and to constructively cope with and overcome them. Don't downplay or ignore them, face them.

Bias, in other words, is better acknowledged and addressed, then it is ignored or overlooked.

Overview of Obligations for Administrators in Post-Secondary Education

To pull together, briefly, the information presented; first, the Charter has been held not to apply to universities, but it does apply to other post-secondary institutions, such as community colleges and technical institutes. Human rights legislation is found in all provinces and any educational institution may face a complaint laid pursuant to that province's act. With the exception of Alberta, administrators in other provinces face employment equity legislation, and federal contractors equity rules may have an affect on institutions in every province.

What all of this means is that discrimination is a major issue in Canada today, an issue which educational administrators must be aware of and respond appropriately to. First, they need to familiarize themselves with the relevant law and with the issues that are involved. There is no excuse for an administrators ignorance about discrimination in 1992.

Second, a pro-active stance should be adopted. The rules arising from sexual harassment are good rules to apply generally to discrimination; that is to create a policy about discriminatory practices (what they are, what the consequence would be to such actions) to inform staff as to what the policy is, and to implement it.

At a presentation made to lawyers attending a Canadian Bar Association - Ontario's institute of continuing legal education:

> ... The "number one objective" should be pro-active: the training. The putting in place of policies, whether they be in harassment, internal investigation, or reporting (Brillinger, 1992, p.14).

What are the arguments against waiting to react against claims of discrimination if any come. First, it leaves the employer in a position where they may be investigated, may face penalties, may lose funding, and may attract public notice and censure for both their short-sightedness and for their failure to address internal problems.

Second, it may leave employers scrambling to modify their workplace and their policies, and they may end up with inappropriate people in important positions.

Third, employees who do not move to instigate change are losing a potential resource, and are thereby limiting their own potential, both short and long term.

Talented women are not the only losers when companies fail to hire them or later offer them promotion. Assuming that most women are potentially as good at filling executive jobs as most men, employers are limiting their pool of available management talent by around half.

> Of recent graduates, 52% in America and 44% in Europe are women ... The Company (or other employer) that fails to recruit them now will find its pool of middle managers inferior to that of a wiser employer in a few years time; likewise, which matters more, its upper management the years later, if (as likely) it goes in displaying the same bias further up the ladder (Women in Management, 1992). (In

> Canada, by comparison, in 1989, 55% of undergraduates were women. Research and Information on Education, 1992, p.16)

Finally, those employers who do not move to integrate their female employees throughout their organization, and not to eliminate discrimination breach rules which are deeper than legal rules - namely rules of fairness and equity for all their employees. Those who fail these tests will ultimately be held morally, and perhaps legally, accountable.

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GENDER DISCRIMINATION: A LEGISLATIVE AND CONSTITUTIONAL FRAMEWORK FOR POST-SECONDARY EDUCATIONAL ADMINISTRATORS

BY

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JUDITH K. SIMONSEN-CAIRNS

A THESIS
SUBMITTED TO THE FACULTY OF GRADUATE
STUDIES AND RESEARCH
IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE
OF MASTER OF EDUCATION

DEPARTMENT OF ADULT AND HIGHER EDUCATION

EDMONTON, ALBERTA

FALL, 1992

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ISBN 0-315-77158-5

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DEGREE: MASTER OF EDUCATION

YEAR THIS DEGREE GRANTED: 1992

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Judith K. Simonsen-Cairns

JUDITH K. SIMONSEN-CAIRNS
Site 210, Box 30, R.R. 2
St. Albert, Alberta
T8N 1M9

August 19, 1992

Equality will require change, not reflection - a new jurisprudence, a new relation between life and law.

MacKinnon, C. (1989)
Toward a Feminist Theory of the State.
Massachusetts: Harvard University Press, p.249

THE UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled "Gender Discrimination: A Legislative and Constitutional Framework for Post-Secondary Educational Administrators" submitted by Judith K. Simonsen-Cairns in partial fulfilment of the requirements for the degree of Master of Education.

Dr. B. Young

Dr. F. Peters

G Gall
Professor G. Gall

DATE: 26 June, 1992

To Christopher and Lisa

ABSTRACT

This thesis deals with the legislative and constitutional framework of rules prohibiting gender discrimination in Canada today. The framework is intended particularly for the use of post-secondary educational administrators who must deal with and interpret these rules, but may prove useful in other contexts as well.

First, discrimination and systemic discrimination are defined from case precedents, and the reasons for affirmative action are reviewed. Second, human rights legislation is examined - the historical background to its development, the areas and grounds of discrimination which are prohibited, how human rights tribunals are formed and proceed, and problems which are inherent within the existing human rights process. The impact of the Canadian Charter of Rights and Freedoms on post-secondary institutions is reviewed, along with the impact of the Charter on human rights decision making.

Finally, the manner in which affirmative action works is reviewed and the argument is made that both affirmative action and human rights legislation are necessary to truly curtail gender discrimination in post-secondary educational administration. Certain specific issues of gender discrimination are examined and recommendations for sensitivity and flexibility in dealing with issues of discrimination are put forth.

PREFACE

The area of law which this thesis focuses on, discrimination, is a complex area of law which brings into play not simply legislators and the court, but also human rights tribunals and the Constitution. With so many sources of legal authority there is a need to understand how they relate to each other.

Legislation is, of course, created by legislators. As heirs to the English common law tradition, Canadians are subject to parliamentary supremacy, meaning that case precedent, legal rules created by judges, may be overridden by legislators. Where statutes exist, judges turn first to them, then to existing case precedent to interpret them. If no statute exists, the court turns directly to case precedent developed in other court challenges - preferably at the Supreme Court level, but appellate and trial level decisions are also used.

Generally, human rights tribunals have an authority similar to trial level courts to create decisions. Moreover, appeals from such tribunals are normally to appeal courts and ultimately to the Supreme Court of Canada.

The Constitution is at the foundation of our legal system. Included within the Constitution is the Charter. Laws must not violate any rights guaranteed under the Charter, or they can be challenged and struck down as unconstitutional.

Thus, constitutional law is the exception to parliamentary supremacy, as it gives courts the power to override legislators (subject to the notwithstanding clause in S.33, and to S.1, which creates reasonable limits).

Within this thesis reference will be made to all four of these sources of authority in order to understand the legal framework of rules on discrimination.

ACKNOWLEDGEMENTS

First, I would like to express my sincere thanks to DR. BETH YOUNG for her encouragement and support of this thesis. Her interest provided motivation for its completion.

Second, my thanks to DR. FRANK PETERS of the Department of Educational Administration, and PROFESSOR GERALD GALL of the Faculty of Law, both at the University of Alberta for their assistance and guidance as committee members.

My thanks also to SHERYL ZAJAC for her assistance in the preparation of the manuscript.

Finally, my thanks to my spouse, CHRISTOPHER, for his patience and support while I undertook this project.

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... if there be a portion of society's life in which tensions of the culture came to expression, in which the play of variant urges can be felt and seen, in which emergent power-patterns, ancient views of justice tangle in the open, that portion of the life will concentrate in the case of trouble or disturbance. Not only the making of new law and the effect of old, but the hold and thrust of all other vital aspects of the culture, shine clear in the variable of conflict.

K. Lylewellyn and A. Hoebet, The Cheyenne Way. University of Oklahoma Press: Oklahoma (1941, pp.28-29).

CHAPTER I

Introduction to the Study

Prior to 1982, issues of gender discrimination which had to be taken into consideration by post-secondary educational administrators were few in number and the topic was undoubtedly seen as remote or tangential, something which did not require serious consideration.

The coming into force of the Canadian Charter of Rights and Freedoms on April 17, 1982 changed that. Firstly, educational administrators immediately faced possible Charter challenges, challenges over such issues as mandatory retirement.

Second, because of strengthened concepts of individual rights as interpreted by courts under the Charter, the possibility of a challenge under provincial human rights legislation increased greatly. Issues such as sexual harassment became serious topics, demanding policy formulation by administrators.

Third, within a few years after the passage of the Charter, affirmative action legislation began to be formulated, both federally and in the majority of provinces. Contractor's Equity rules also had an effect on universities seeking federal funding.

From being a remote topic, discrimination became a central issue for the administrator of a Canadian post-secondary institution in the 1990's. The topic is complex, having various threads which must be separated out and separately analyzed in order to understand all of the issues involved. This thesis attempts to create a kind of map, or overview of rules relevant to gender discrimination, both under legislation and under the Charter. Further, this overview, while intended particularly for educational administrators, may also prove useful to others who need this kind of introduction to this topic.

Purpose of the Study

The primary intent of this thesis is to understand the legal framework of rules constraining gender discrimination in Canada today. Consequently, the questions to be examined are:

1. What has the Supreme Court of Canada defined as discrimination in Canada at this time?
2. How does human rights legislation restrain gender discrimination?
3. What has been the impact of the Charter been on gender discrimination?
4. What impact does affirmative action have on employers such as educational institutions?

5. What measures may administrators of post-secondary institutions take to eliminate gender discrimination?

Significance Statement

It is crucial for educational administrators to be informed about issues of discrimination. The first and most obvious pragmatic reason for this is risk management. Educational institutions obviously wish to cut liability as much as possible, and that necessitates knowledge of the law. A major purpose of this thesis is to simplify and clarify this potentially confusing area, so that administrators can understand their responsibility and thereby limit their liability.

A second element of risk management is to be pro-active with problems, so that there is not simply a compliance with the letter of the law, but that obvious future problems are addressed. Within the province of Alberta, for example, it should be clear to educational administrators that women are underrepresented as administrators and that a concerted recruitment effort of women should be made. By recognizing the problem and acting on it, institutions can be more prepared when employment equity does become law.

Third, I think that the Canadian Charter of Rights and Freedoms has had a great influence on Canadians. Educational administrators are going to find themselves dealing with staff and students in the future who are aware of their individual rights in a way which historically they were not (See McKay, 1990). Once again, awareness of the basic rules will be necessary to deal with these expanding expectations.

Finally, the rules about discrimination seem important because they are based on concepts of treating individuals with respect and dignity, and in that sense seem inherently correct and fair. While many employers and individuals practice discriminatory behaviour, few of them boast about it. The law by no means represents the highest common denominator of behaviour, rather it is that set of rules which democratic communities agree to be bound by, a starting place. To be uninformed then, is to not even locate the starting place.

Conceptual Basis of the Study

The study involves conceptual analysis based on the Charter, legislation and case precedent. Case precedent is crucial in understanding the law for two reasons. First, it is through case precedent that judges tell us how we must understand and interpret such items as the constitution and legislation. Second, with our British legal tradition, where no legislation exists, precedent, by itself, provides rules of law.

As a secondary source of understanding, legal texts and articles will be referred to, as well as business administration journals. Finally, reference will be made to newspaper articles. The concepts of discrimination are evolving and changing very rapidly, and to keep up with such rapid change, newspapers are often more topical than books can be.

Limitations and Definitions of the Study

Limitations

This thesis does not attempt a literature review, as the scholarly literature on discrimination, human rights and the Charter is so vast that it could, in itself, be the topic of a thesis. Particularly seminal works are referred to throughout the thesis and listed in the bibliography.

Second, the emphasis within the thesis is provincial, with a particular focus on Alberta. On some topics, such as the Charter, understanding and interpretation are ultimately made uniform through Supreme Court of Canada precedent. On other topics, such as human rights legislation, the rules are provincial and there can be a great variation from province to province. Some Canadian provinces, such as Ontario, have made a concerted effort to deal with some of the problems in the human rights process mentioned critically in this thesis. When this thesis is critical of the human rights process, it should be remembered that that criticism is most specifically addressed at Alberta.

Finally, the emphasis is that of the author. The thesis is the writer's attempt to draw together and to extrapolate what is most meaningful in the area.

Delimitations

While an overview has been provided in some areas, such as with the prohibited grounds and areas of discrimination, the focus is on rules about gender discrimination. Given this, only certain sections of the Charter are analyzed, namely S.1, S.15 and S.28, as well as S.52 of the Constitution Act, 1982. Other sections of the Charter have not been examined.

Given that the focus of the thesis is provincial, and since Alberta has not enacted affirmative action legislation, the Federal employment equity rules have been used as a prototype of such legislation.

Key Terms and Concepts Used Within the Thesis

The starting place in a thesis on discrimination must be definitions - definitions of equality, discrimination and systemic discrimination, as provided through case precedent.

A Historical Definition of Equality - Aristotle

Aristotle's principle of formal equality is one of the oldest and best known concepts in the western world of what it means to treat individuals either equally or with prejudice. His view was that "things that are alike should be treated alike, while things that are unalike should be treated unlikely in proportion to their unalikeness" (Aristotle, 1925, p.1131a-6).

In other words, things which are the same should be treated the same and as things become increasingly dissimilar, they can be treated increasingly differently. Given the simplicity and clarity of the thought it is not surprising that it has endured for centuries as perhaps the most popular definition of what equality is, and, by implication, what discrimination is.

It is not surprising, then, that Aristotle's principle has been referred to in contemporary law, in the case of R. v. Gonzales (1962), for example. That case considered whether a provision of the Indian Act, (1952), which made it an offence for an Indian to have alcohol in his or her possession off a reserve, was in breach of the Canadian Bill of Rights, (1960). At the level of the British Columbia Court of Appeal Aristotle's definition was accepted. The court noted that equality before the law could not mean "the same laws for all persons", but rather:

> ... in its context S.(1)(g) means in a general sense that there has existed and that there shall continue to exist in Canada a right in every person to whom a particular law relates or extends, ... to stand on an equal footing with every other person to whom that particular law relates or extends and a right to the protection of the law (p.243).

In other words, as long as a law was uniform for a given group of people (in this case all Indians), it was acceptable. This reasoning was subsequently rejected by Justice Ritchie at the Supreme Court of Canada level in R. v. Drybones, (1970). He stated at p.297

> ... I cannot agree with this interpretation, pursuant to which it seems to me that the most glaring discriminatory legislation against a racial group would have to be construed as recognizing the right of each of its individual members to equality before the law, so long as all the other members are being discriminated against in the same way.

While Aristotle's definition had been rejected by the Supreme Court in interpreting the Canadian Bill of Rights, it was, however, resurrected after S.15 of the Charter of Rights and Freedoms (1982) came into effect in April, 1985. Madam Justice McLachlin, for example, of the British Columbia Court of Appeal (as she then was) cited the principle with approval in Andrews (at the Appeal Court level):

> ... The essential meaning of the constitutional requirement of equal protection and equal benefit is that people who are "similarly situated be similarly treated" and conversely, that persons who are "differently situated be differently treated"... (Andrews, 1986, p.278).

Andrews v. The Law Society of British Columbia (1989) - Canada's Present Definitions of Equality and Discrimination

The case of Andrews involved an British citizen who had been barred from membership in the Law Society of British Columbia on the basis of not being a Canadian citizen. He challenged this restraint of citizenship as being a violation of S.15(1) of the Charter, i.e. of treating him in a discriminatory manner, and the Supreme Court of Canada agreed with him.

The reason that Andrews is particularly relevant in any discussion of discrimination in Canada in 1992 is that it was the first case wherein the Supreme Court of Canada explored how S.15(1) of the Charter should be interpreted, and thereby offered definitions of both equality and discrimination. Lower levels of courts had been debating the meaning of this very significant section since it came into effect in April, 1985, but not only was there no consensus as to interpretation, there was considerable disagreement.

In Andrews, as in Drybones, nearly two decades earlier, the court rejected Aristotle's "equally situated" test as definitive of equality.

Justice McIntyre, speaking for the majority, said:

> The test as stated, however, is seriously deficient in that it excludes any consideration of the nature of the law. If it were to be applied literally, it could be used to justify the Nuremberg laws of Adolph Hitler. Similar treatment was contemplated for all Jews (p.221).

Discrimination - S.15(1)

S. 15(1) reads as follows:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Having rejected Aristotle's definition of equality Andrews went on to offer a definition of what constituted discrimination under S.15(1). Justice McIntyre, again speaking for the majority, defined it as follows:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classified (p.228).

A complainant must show two things to prove a breach of S.15(1). First, it must be established that he or she is not receiving "equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law ..." (pp.233-234). Second, it is necessary to show that the "legislative impact of the law is discriminatory" (p.234). To establish this second ingredient will "... in most, but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged." (R. v. Turpin, (1989), Madam Justice Wilson at p.336).

Furthermore, this secondary requirement, namely establishing that the differential treatment is disadvantageous, demands an examination of the "larger context" of the discrimination, (Turpin, p.336), that is, within the larger context of Canadian society as a whole. Madam Justice Wilson, in Andrews, had already pointed out that any consideration of disadvantage could not take place in a vacuum.

> ... This is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others (pp.201-2).

Finally, in understanding this second requirement, it should be understood that not all those groups who see themselves as sustaining disadvantage because of differential treatment will be helped. Rather, it will be those groups "who suffer social, political and legal disadvantage in our society" (p.203).

Assuming that these two ingredients of a S.15(1) challenge were established (and that S.15(2) was not applicable), the burden would then move to the government whose law was being challenged, to attempt to show that the discrimination in question was a "reasonable" one under S.1 of the Charter, and that "the law in question should therefore be upheld".

It should be obvious from this two step test for discrimination, developed in Andrews and Turpin, that not all instances of treating people differently will be seen as discriminatory. Legislators, as a matter of course, create myriad distinctions between groups of people and in many cases these distinctions will be seen as necessary, reasonable and legitimate.

Madam Justice Wilson spoke to this issue in Andrews.

> ... I am not prepared to accept that all legislative classification must be rationally supportable before the courts. Much economic and social policy making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions (p.207).

Systemic Discrimination

The historical, or human rights concept of discrimination saw it as an individual wrong, occurring against a particular individual, who should then seek an individual remedy. Over the past ten years however, there has been a growing perception in Canada that where discrimination occurs it is often systemic in nature, involving biases against whole groups of people and that an appropriate remedy must reflect that fact.

The Abella Report.

The Abella Report (1984) on equality in employment is a reasonable starting place in understanding systemic discrimination, as the Report offers one of the most thorough studies of systemic discrimination practices in Canada. The original terms of reference of the Royal Commission in question were "to enquire into the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting individuals to compete for employment opportunities on an equal basis". (Order-in-Council P.C. 1983-1924 of 24 June, 1983).

On page two of the report systemic discrimination is described in the following manner:

> Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics...
>
> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

Systemic discrimination, in other words, arises when whole groups of individuals may not be hired, or if hired not promoted or given opportunities for advancement, for reasons unrelated to the capacities of individuals within that group, but based rather on the biased perceptions of those doing the hiring or promoting.

Employment Equity - Action Travail des Femmes (1987).

This case arose out of a challenge to a "Special Temporary Measures" Order imposed on the Canadian National Railway Company by the Canadian Human Rights Commission. The Order in question required the C.N. to "cease certain discriminatory hiring and employment practices and to alter others". It also set a goal of 13% female participation in targeted job positions (blue collar) and "established a requirement to hire at least one woman to fill every four job openings until that goal was reached (p.13). This Order arose in response to the 155 complaints against the C.N. which had been lodged with the Human Rights Commission by February 18, 1982. The case is of significance in any discussion of systemic discrimination within Canada because it both defines systemic discrimination and gives an outline of what the goals of affirmative action are.

Chief Justice Dickson, in a unanimous decision of the Supreme Court of Canada offered the following definition:

> ... systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural forces", for example that women "just can't do the job" (see the Abella Report, pp.9-10). To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged (p.24).

Systemic discrimination, in other words, is discrimination based on the biased perceptions of the discriminator. When deployed against women, it means that a given woman is not judged according to her actual talent or capacity, but is excluded from serious competition simply by virtue of being a woman. An individual, through pre-judgment, could be precluded from job opportunities, advancement and perhaps even vertical moves based simply on the response of employers to her gender.

Noting the tiny number of women who had worked in blue collar positions at Canadian National (0.7% of blue collar jobs in the St. Lawrence Region), the Supreme Court also noted that the small number of women in non-traditional jobs "tended to perpetuate discrimination" (p.118). Furthermore, Canadian National, knowing that its practices were discriminatory in effect, did "nothing substantial to remedy the situation".

Chief Justice Dickson observed:

> When confronted with such a case of "systemic discrimination", it may be that the type of order issued by the tribunal is the only means by which the purpose of the Canadian Human Rights Act can be met. In any programme of employment equity, there simply cannot be a radical dissociation of "remedy" and "prevention" (pp.118-119).

Based on this, the court upheld the Order in question.

Theory of its Efficacy.

Employment equity, we are told in Action Travail des Femmes, is meant to work in three ways. First, it defeats discriminatory intent and practice. Where there has been a conscious attempt within an employment context to block employment opportunity based entirely on discriminatory bias, discriminatory individuals will "lose" as regards their discriminatory intent, as formerly excluded groups will have to be represented in the workplace.

Second, Chief Justice Dickson said:

> ... by placing members of the group that had previously been excluded into the heart of the work place and by allowing them to prove ability in the job, the employment equity scheme addresses the attitudinal problem of stereotyping (p.120).

The excluded group, in other words, once allowed to do jobs that they formerly lacked access to, may prove their ability; thereby hopefully converting at least some of those who formerly viewed them as incapable of performing into rethinking their conclusions. Thus, biased attitudes are challenged and hopefully dissipated.

Finally, employment equity should create a "critical mass" of the formerly excluded group in a given employment situation. In other words, tokenism should be eliminated "... it is no longer the case that one or two women, for example, will be seen to 'represent' all women" (p.121). This is very important. What individual would wish to be seen as the representative of his or her whole gender? Conversely, how unfair to generalize from the failings of a particular individual to the whole group of which he or she is a member.

Recognition of systemic discrimination by Canadian courts, while recent, acknowledges its seriousness. Justice Kerans, for example, speaking for the Alberta Court of Appeal in R. v. Keegstra (1988) said the following:

> ... a distinction can be made between the pain suffered by the target of isolated abuse and the crushing effect of the systemic discrimination of which Shakespeare's Shylock accuses the larger society of his time. Nobody enjoys being the target of name - calling, but the sense of outrage may be bearable if that abuse is rejected by the community as a whole. Then, the pain can be just a psychological pinprick (p.26).

While Kerans was not discussing systemic discrimination in a gender context, the general description of the "crushing effect" seems transferable. For the individuals whose talents and merits are never truly assessed, they are indeed "second class citizens".

Chief Justice Dickson's conclusion in Action Travail des Femmes that employment equity is a necessary step in addressing systemic discrimination seems self-evident. Where biased perceptions about whole groups of individuals are held, those holding such beliefs do not relinquish them easily or readily. Employment equity is meant to ensure opportunities for members of disadvantaged groups that may otherwise never exist because of those biases.

So often we fail to see that a course of action may unnecessarily infringe on the rights of the individual because we have simply become accustomed to that way of doing things.

Gerard V. LaForest (1983), "The Canadian Charter of Rights and Freedoms: An Overview", Canadian Bar Review, Vol.61, No.1, p.24

CHAPTER II

Discrimination - The Historical Context

The Constitution Act, 1867

The starting place, in a discussion of human rights and discrimination in Canada is undoubtedly the Constitution Act, 1867 (formerly the British North America Act, 1867), as it is that document which, before 1982, constituted the Canadian Constitution and was therefore the foundation of the Canadian legal system.

What is immediately apparent about the Canadian Constitution is that it is a 'bare' constitution, dealing with issues central to Canada's sovereignty. Being the document which gave Canada its sovereignty, its most crucial function was to describe the format which a legitimate government must take. It also outlined the special position that Quebec would hold, giving it special rights over language, religious and law. Hogg states: "... The B.N.A. Act did no more than was necessary to accomplish Confederation (1985, p.3).

Having given power to Canadians to govern, the Constitution Act, 1867, went a step further, and divided that power between the federal and the provincial levels of government. In certain areas, only the federal government could create law (such as banking) and in other areas only the provincial governments could create law (such as education). If a level of government attempted to create law outside its authority, it was viewed as potentially ultra vires, and the legislation would be subject to judicial review. If found to actually be ultra vires, it could be overturned.

Generally, what the Constitution Act, 1867, did not address were issues of civil liberties or protections. The protection of the individual, such a key element of the American constitution, was not to be addressed in the Canadian constitution until the passage of the Charter of Rights in 1982.

> ... The Canadian framers of the B.N.A. Act even eschewed the alluring American precedent of a bill of rights, and instead left the civil liberties of Canadians to be protected by the moderation of their legislative bodies and the rules of the common law - as in the United Kingdom (Hogg, p.4)

While Canadians lacked protection of their civil liberties under their constitution, however, it should not be thought that they had no legal tradition of, or public expectation of, individual rights or liberties. Rather, they were heirs to British common law traditions, including such old rights as a presumption of innocence when charged with an offence, and the right to challenge detention by way of an application of habeas corpus. What they lacked, specifically, was constitutional protections of their individual rights.

The Canadian Bill of Rights

In 1960, under Prime Minister Diefenbaker, the Canadian Bill of Rights was enacted. While the concept was a good one - the introduction of restraints against legislators - the Bill lacked efficacy. As an ordinary federal statute, it was applicable only to federal laws, offering no protections against provincial violations of civil liberties. Furthermore, even as a federal statute, it proved of little force.

In only one instance, namely in R. v. Drybones, (1970), did the Supreme Court declare a statute provision to be inoperative for a breach of the equality clause of the Bill (Hogg, 1985, p.787). In other challenges the Canadian Bill of Rights was defined narrowly, and held not to be applicable. This was probably based largely on the traditional deference of Canadian judges to legislative authority. Chief Justice Antonio Lamer of the Supreme Court of Canada, commenting recently on how the Charter had changed the thinking of the judges in the court said:

> Most judges were trained in the law prior to ... the Charter, so we were trained, not to judge laws, but to

> apply them and, if they were open to interpretation, to interpret them.
>
> But, with the Charter we are commanded, when asked to do so, to sometimes judge the laws themselves. It is a very different activity ... asking us to make what is essentially what used to be a political call.
>
> And so to many of us ... this was a very drastic change in the judicial approach to law. (Sallott, 1992, p.A17)

Thus, judges who upheld legislation, despite its apparent conflict with the Canadian Bill of Rights, were very much adhering to their English judicial legacy. Not surprisingly, the Bill's actual impact on the Canadian legal system was negligible.

Canadian Human Rights Legislation

Historical Background

Contrary to the beliefs of many Canadians, Canada must count as part of its history a series of racist and sexist statutes, backed by judicial authority upholding the statutes in question. In Cunningham v. Tomey Homma (1903), for example, the Judicial Committee of the Privy Council upheld a provision in the British Columbia Elections Act which denied the franchise to "Chinamen, Japanese and Indians". Similarly, in 1914, The Supreme Court of Canada in the case of Quong-

Wing v. The King upheld the validity of a Saskatchewan act which prohibited white women from residing or working in any "restaurant, laundry or other place of business" which was owned or managed by Chinese.

In 1885 the federal government passed the Chinese Immigration Act, restricting the number of Chinese immigrants to one per fifty tons of tonnage, and imposing a $50 entry duty on every Chinese immigrant. In 1900 that duty was raised to $100 and in 1903 it was raised again to $500 (the so called 'head tax'). In 1923 a new Chinese Immigration Act was passed with such broad powers of exclusion that Chinese immigration basically ceased. It is estimated that only forty-four Chinese immigrants entered Canada legally between 1923 and 1947 (Kang, p.612).

Nor were Asiatics the only group affected by legislators or the judiciary. In Christie v. York Corporation [1940], Christie, who was black, was refused service in a beer tavern in the Montreal Forum. The Supreme Court of Canada upheld the right of a business to decline service on a ground such as race. Another powerful example of discrimination is that of the denial of the franchise to native indians in Canada until 1960. Religion also constituted a basis for persecution. Doukhobours, for example, were denied the vote until 1953.

Gender was another ground for discrimination, with the vote being withheld from women in Canada. Alberta, in 1916, was the first province to extend the franchise to women and Quebec, in 1940, the last.

World War II constituted a turning point in this line of discriminatory legislation and judicial authority. As Tarnopolsky (1989, p.24) notes, there were probably a variety of reasons for this.

> In Canada, ... , the first century after Confederation witnessed an increase in the number of statutes which discriminated against certain people. Most of these were still with us until World War II. It is only since that time that all these laws have been repealed, probably partly as a reaction to the horrors of racism exhibited just before and during World War II, partly because of the carrying to independence of tens of African and Asian former colonies, and partly because of the lead of the United Nations, both to bring about decolonization and to draft new standards condemning racial discrimination.

Thus, those attitudes which had always been morally indefensible, but had been enshrined in legislation, were simply no longer acceptable and legislation had to be modified accordingly.

Starting with fair accommodation and fair employment acts, passed originally by Ontario in 1951, the provinces of Canada gradually adopted human rights legislation. Ontario, again the pioneer, consolidated its humans rights legislation into the Ontario Human Rights Code in 1962. By 1975 every province in Canada had passed human rights legislation and established human rights commissions. In 1977 the federal government also passed legislation, the Canadian Human Rights Act.

Structure of the Statutes

Prohibited Grounds of Discrimination

To understand Canadian human rights legislation as it now is, two concepts need clarification: prohibited grounds and prohibited areas of discrimination under the acts. The prohibited grounds are the kinds of discrimination which are not allowed. The most basic kinds of discrimination which are prohibited by all of the Canadian acts, are discrimination on the basis of race (or either national or ethnic origin) or on the basis of religion. With these grounds discrimination is never permissable. Furthermore, in the case of religion there is case precedent stating that, regarding the religious beliefs of an employee, an employer must display a "reasonable accommodation" to those beliefs (Ontario Human Rights Commission v. Simpson-Sears Ltd., 1985).

With some other kinds of discrimination, such as age, sex and handicap, discrimination by employers may sometimes be justified. It may be justified if the employer can establish a bona fide occupational requirement (or a bona fide occupational qualification, as it is referred to in parts of Canada other than Alberta). A BFOR (or BFOQ) requires establishing that certain people literally could not do a given job. In the case of age, for example, if early mandatory retirement was required by an employer, establishing a BFOQ would mean proving that employees past the stipulated age were not capable of doing the work in question.

In the case of sex, where an employer wished to hire only employees of a given gender, the employer would face the burden of establishing that only one gender could do a given job. Lastly, in the case of handicap, where an employer was demanding, for example, perfect vision for the applicants for a given job, the employer would have to establish that perfect vision was necessary for the performance of the job. Needless to say, with the possible exception of handicaps, it is very difficult for employers to establish such lack of capacity.

Other kinds of discrimination prohibited in various provinces or by the federal government acts include such grounds as: political belief, marital status, language, source of income, sexual preference, criminal records for which pardons have been given, and social condition or source of income.

Prohibited Areas of Discrimination

Prohibited areas of discrimination are the contextual frameworks within which discrimination may not occur in relation to the prohibited grounds. Basic contexts recognized in Canadian Acts include signs or symbols, tenancies, the provision of public services and employment. Of these, employment is generally recognized as the most important, affecting, as it does, people's opportunities for advancement, for economic betterment, and for full opportunities to develop and display their skills. It is not surprising that human rights legislation is commonly placed in the portfolio of the Minister of Labour.

In using human rights legislation, the two concepts of prohibited grounds and prohibited areas of discrimination are combined. The owner of a restaurant (providing a public service), for example, could not refuse to serve an individual on the basis of his or her race. A restaurant owner, however, is by no means prohibited from denying service on other grounds - that individuals were not properly attired, for example, or because they were behaving in a disorderly manner.

In the case of an employer, the employer, as discussed earlier, may never discriminate on the basis of religion or race and may only discriminate on the basis of age, sex or handicap if a BFOQ can be established. This prohibition extends to advertising for jobs and to job interviews.

Human Rights Commissions in Canada

Since human rights legislation is under the jurisdiction of human rights commissions or tribunals, it is necessary to understand how the membership of these bodies is selected. Ideally, it would seem that the individuals on such boards would both need to be and to be seen to be, independent of the governments which appoint them. Without such independence, the impartiality of decision makers is an issue. Can a partial board decide without bias whether discrimination has occurred against those who may be questioning the actions of large interest groups or government?

The reality of the choice of candidate is very different from the impartiality proposed. As noted by Ruff (1989, p.4)

> A review of 188 appointments to the federal human rights tribunal panel in 1986 showed that a great many listed their support for and their various contributions to the political party in power, such as campaign manager, party official, donor; very little was listed indicating any knowledge of human rights law.

Political patronage is the visible basis for appointment, as opposed to merit and competence of a given candidate. Another problem which may flow from such patronage appointments is that the commission will be too closely aligned to a particular political agenda, as opposed to examining cases on their merit. Ruff points out that clear criteria are needed in Canada for the selection of human rights boards, and that they should include, normally,

> demonstrated expertise in human rights and commitment to human rights legislation, credibility among groups whose rights are protected under the legislation, independence and representativity of the population (p.6).

Complaint Process

The procedure of a complaint follows the general structure of complaint laying common in labour law. Action under the legislation is triggered by a complaint laid by an individual complainant.

This requirement for a complaint before any action is triggered is problematic in itself. First, it presumes that the victim knows of the existing human rights legislation and of the remedial actions available under it. Without a great deal of publicity, advertisement, and public education by the government in question, this simply will not be true. Second, it presupposes that victims of discrimination feel confident enough to pursue a remedy; that they are neither too fearful of retaliation (such as loss of their job if it is an employer they are complaining about) nor too ashamed of the event or behaviour in question to raise a complaint and to make the issue public. Third, it means that where discrimination is systemic, there will not be an effective remedy for the problem, as any remedy imposed will not address the pervasiveness of the issue, but will rather act as though the incident in question was an isolated problem.

Following a complaint an investigation may or may not be held, at the discretion of the human rights tribunal in question. Several problems arise at this point; one is, as already discussed, the true independence of the tribunal. How likely is it, for example, that if a crown corporation is an alleged offender, a rigorous investigation will be made by a tribunal with overly close ties to the government which it should now be investigating?

Besides the problem of questionable independence, another problem exists and that is the resources of human rights tribunals. The general Canadian pattern is that funding is severely limited, meaning that resources are meagre, staffing is limited and the number of cases which could possibly be seriously pursued is minute.

Legislation such as Alberta's indicates that a settlement, or compromise should be striven for. Only if that is not possible is a Board of Inquiry potentially to be appointed. If a Board is appointed in Alberta, it is a one to three person board. Those chosen are often lawyers. What is significant is that only if a Board is appointed does a complainant have an opportunity to have a hearing. Furthermore, the broad remedial provisions of the Act (damages, jobs re-instated, etc.) are only available pursuant to the appointment of said Board (Individual's Rights Protection Act, S.31). One test of the efficacy of human rights legislation then, is how many Boards are appointed in a given year proportionate to the number of complaints which have been laid. The figures are not encouraging. In Alberta, in 1990, 542 complaints were laid. No boards of inquiry were appointed. While some complaints may have lacked merit, and others may have been successfully settled, it is difficult to imagine that none of these cases deserved to go forward to a board.

Even with those human rights tribunals which are stronger and exercise remedies rigorously, such as Ontario's, the number of boards appointed is quite small given the number of complaints laid. (The issue of how strong or how weak a provincial human rights commission is is a political one, based on the political philosophy of the provincial government in question.) Furthermore, with stronger tribunals, other problems arise, such as a possible waiting time of up to two or even three years before an investigation is held. (It is interesting to note a recent case from Manitoba in which a three-year delay between the submission of a complaint to the Manitoba Human Rights Commission and its subsequent prosecution was held to be a violation of an accused's rights. See Hodder, 1992.)

Another issue which arises is how the human rights commission decides whether or not to proceed to a board. The process could be characterized as bureaucratic decision-making, very different in nature from a judicial model. In a judicial context, for example, at a pre-trial hearing such as an examination for discovery, a primary principle observed is that all the affected parties must be present, both so that they are kept fairly informed of what is happening in the proceedings in question and so that they may be questioned or cross-examined. Through this process counsel should be able to form opinions as to both concerned parties credibility. Parties to proceedings also have a right to examine all pertinent documents.

Human rights commissions, on the other hand, reach decisions as to whether a Board is justified without the affected parties being present. There is no chance to question, let alone judge the credibility of a complaint and of a respondent in a particular case. Obviously, in such a process there is no way in which a complainant has an opportunity to demand production of and then examine pertinent documents or to question the other party. From a judicial perspective, it is as though decision making occurs blindfolded; not blind in the sense of being impartial, but rather in the sense of being uninformed. It is not surprising that complainants are often unsatisfied with this process. As noted by Hooshangi (1984)

> The most common complaint about the human rights process is that it operates in a veil of secrecy in a very bureaucratic setting. It is ironic for such an idealistic institution to operate in such a bureaucratically secretive manner.

Summary

Human rights bodies in Canada, while perhaps well intentioned in their genesis, have been plagued by a number of problems such as lack of impartiality and expertise by tribunal members, lack of funding, a process of decision making which is in essence bureaucratic, often blocking rather than facilitating complaints and filtering out all but a handful of complaints from proceeding. In the early 1990's, however, it should be noted that there is a great variation in Canadian human rights tribunals, both as to their calibre and in their power to remedy (both as given and exercised). For example, both the Ontario and the Federal act have the remedial capacity to impose affirmative action orders.

A final question remains about efficacy and that is how courts have dealt with these cases where a Board was established and where the issue in question went on through a process of judicial appeal of the decision reached. Since this is an area where the influence of the Charter becomes pertinent, this issue will be dealt with in Chapter III, "The Charter and Issues of Discrimination".

To approach the ideal of full equality before and under the law and in human affairs an approach is all that can be expected - is the main consideration.

McIntyre, J. in Andrews v. Law Society of British Columbia (1989) 36 CCR, Part 2, p.220

CHAPTER III

The Charter and Issues of Discrimination

The Passage of The Charter of Rights, 1982

The modification of the Canadian Constitution in 1982 by the addition of a Canadian Charter of Rights and Freedoms was, in part, a change which had long been contemplated. Prior to 1982 any change or amendment to the constitution required the approval of the British Parliament (See Hogg, 1985, pp.51-56). Since the nineteen twenties, Canadians had been eager to have this power of amendment for themselves and in the nineteen-seventies, when reference was being made to "repatriation" or to "bringing the constitution home", it was that power of amendment which was being referred to.

The addition, or entrenchment, of civil liberties and rights in a Charter was a constitutional amendment which Pierre Eliot Trudeau made part of his political platform in the nineteen-seventies. When elected, he did indeed include such a Charter in Canada's constitution, through a process of constitutional amendment. The passage of the amendment, however, was acrimonious, involving frequently bitter disputes with the provinces, and in the end Quebec never did sign the 1982 amendments to the constitution.

As has already been noted, Canada was not without a tradition of civil liberties, having inherited England's old common law protections of the individual - protections such as the right to a Writ of Habeas Corpus, meant to protect individuals against certain abuses of power by the state, the right to an open and public trial procedure and, frequently, the right to a jury trial if charged with an indictable offence.

In other areas, however, such as protection of the individual, or of groups, against discrimination, or bias, Canada had not managed as well. The Canadian Bill of Rights had been, basically, a failure, and human rights tribunals had not worked as well as hoped, for reasons outlined in Chapter II.

It is interesting to contrast Canada's constitutional history of civil liberties with that of the United States, America's history having been very different. As Pitsula and Manley-Casimir (1989, pp.51-52) note:

> Where Canada's founding document, the British North America Act of 1867, speaks of the right to "peace, order and good government," the U.S. Declaration of Independence of 1776 affirms "life, liberty and the pursuit of happiness" as inalienable rights. These phrases reflect the ideological climate within which each country was born, and provide an appropriate starting point for a look at contrasting value systems. The United States was conceived in a spirit of revolution against a government perceived to

> be authoritarian and paternalistic in such matters as the imposition of tax laws without representations. Canada, on the other hand, was formed as a compromise reached between four colonies - a compromise formed through common interest in building a railway and willingness to remain under imperial rule for another hundred years.

To introduce the Charter was, effectively, to place Canada in a constitutional position much closer to that of the United States, a position whereby individuals would be able to challenge infringements by the government on their individual rights. While Americans have had over two hundred years experience at challenging their government, however, this was a novel experience for Canadians - for Canadian politicians, for Canadian judges and for the Canadian population in general. To move from the position of being a "deferential constituency who would "permit the exercise of considerable autonomy by their leaders" (Manley-Casimir, 1989, p.52) to a position of challenging the power of those same leaders was a considerable step, a step which many Canadians still struggle with nearly a decade after the passage of the Charter.

While the right of challenging government is a new opportunity, however, which many Canadians do not yet fully understand, and which marks a sharp break with historical precedent, it is also a right which many other Canadians have seized eagerly, as is seen by the number of Charter challenges which have arisen since

1982. (As of April, 1992, the Supreme Court of Canada had rendered decisions in 191 cases. Given that only a small fraction of the cases heard at the trial level in Canada are ever considered by the Supreme Court of Canada, this would indicate a very large number of challenges at the trial level of court.) Without extraordinary changes in government, Canadians seem committed to a different relationship with their government than that prior to 1982, a relationship much more geared to challenge (or, in some instances, negotiation).

The Charter of Rights - A Basic Explanation of Who is Restrained

A starting place in understanding the application of the Charter is Section 32, which clarifies to whom the Charter applies to, or who is restrained by it. Section 32 reads as follows:

> This Charter applies:
>
> (a) To the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) To the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Thus, the Charter is aimed at the restraint of government. In summarizing what it is meant to do: it is meant to protect individual citizens from an abuse of power by their own government. It does that by articulating within the Charter a group of rights that are felt to be particularly important in the preservation of a democracy such as the one which Canadians wish to enjoy. When governments (federal, provincial or municipal) pass laws, those laws must not take away from, or infringe upon, the rights which are guaranteed. If they do, an affronted individual may raise a Charter challenge as to the validity of that law, for as section 52 of the Constitution Act, 1982, states, the Charter must be seen as the "supreme" law of Canada.

> S.52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Using discrimination as an example, then, it is only discriminatory laws or discriminatory actions by government which are open to Charter challenge. Discrimination by a corporation or by an individual would be considered to be private discrimination, not addressed by the Charter but rather spoken to by human rights legislation. As is noted by Justice La Forest in McKinney v. University of Guelph (1990), this exclusion was not accidental on the part of Parliament.

> The exclusion of private activity from the Charter was not a result of happenstance. It was a deliberate choice which must be respected. We do not really know why this approach was taken, but several reasons suggest themselves. Historically, bills of rights, of which that of the United States is the great constitutional exemplar, have been directed at government. Government is the body that can enact and enforce rules and authoritatively impinge an individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual. Others, it is true, may offend against the rights of individuals. This is especially true in a world in which economic life is largely left to the private sector, where powerful private institutions are not directly affected by democratic forces. But government can either regulate these or create distinct bodies for the protection of human rights and the advancement of human dignity (p.23).

Universities - Not a Part of Government

While the court had, as regards S.15 of the Charter, decided in the case of Local 580 v. Dolphin Delivery Ltd. (1986), that S.32 of the Charter was limited in its applications, to Parliament and the legislatures and to the executive and administrative branches of government - questions still remained as to what extent the Charter applied to subordinate bodies created and supported by Parliament or the legislatures.

In the case of McKinney v. University of Guelph (1991) Justice La Forest explored the issue of whether S.15 of the Charter applied to universities and concluded that it did not. He said:

> it is evident ... that the universities fate is largely in the hands of government and that the universities are subjected to important limitations on what they can do, either by regulation or because of their dependence on government funds. It by no means follows, however, that the universities are organs of government. There are many other entities that receive government funding to accomplish policy objectives governments seek to promote (page 30).

He made reference to the fact that universities have their own governing bodies with only "a minority of its members" being appointed by government, and that the duty of its members "is not to act at the direction of the government" as the government "has no legal power to control the universities even if it wished to do so". Furthermore, while universities are dependent on government funding "they manage their own affairs and allocate these funds, as well as those from tuition, endowment funds and other sources".

Lastly, Justice La Forest said, the "legal autonomy of universities is fully buttressed by their traditional position in society". Attempts by government to influence such decisions as tenure and dismissal of staff "would be strenuously resisted by the universities on the basis that this could lead to breaches of academic freedom. In a word, these are not government decisions" (p.31).

On this issue of whether universities should be considered part of government five of the seven presiding judges agreed. Justice Wilson dissented (and Justice Cory agreed with Justice Wilson on this issue), and in so doing developed a test for whether a particular body should be seen as part of government. First, however, she challenged La Forest's decision, describing his view as a form of doctrine regarding the role of constitutions known as "constitutionalism". This doctrine, she said, postulates that:

> The potential for tyranny and abuse which large states embody and the role of government should be strictly confined. Social and economic ordering should be left to the private sector. The more the state interferes with this private ordering, the more likely it is that the freedom of the people will be curtailed. Thus, the minimal state is an unqualified good. However, even with the minimal state, there has to be some mechanism to protect the citizen against the risk of government tyranny and that mechanism is the constitution itself. Hence, the concept of constitutional government as protector of the citizen's liberty (page 84).

Wilson noted that it was this narrow view of the "classical" role of states which led La Forest to reach such "a very narrow test" of "government action" under

S.32 of the Charter. While the Americans, however, had such a strong distrust of government that their constitution "enshrines the belief ... that unless the state is strictly controlled it poses a great danger to individual liberty", Canadians "do not share this history" (page 84). Canadians have looked to the state to "respond to demands that Canadians be guaranteed adequate health care, access to education and a minimum level of financial security". Freedom in Canada, she said, has "often required the intervention and protection of government against private action" (page 93). Canadians, in other words, accept a higher degree of government intervention than Americans.

Given both a different relationship to government than the Americans and the fact that "those who enacted the Charter were concerned to provide some protection for individual freedom and personal autonomy in the face of government's expanding role" (p.94), it is imperative to take "a broad view of the meaning of the term 'government', ... one must not be quick to assume a body is not part of government" (p.95).

In McKinney, it was the issue of control (whether it existed, and if so to what degree) that lead to the conclusion that universities were not part of government. Examining how the boards of universities were appointed and their discretion over funds as well as their control of tenure, Justice La Forest said that no assumption should be made "that the universities are organs of government" (p.30). His conclusion was that universities, as they were presently constituted in Canada, had sufficient autonomy or self control that they should not be seen as part of government.

This response, for Justice Wilson, was alarming. She pointed out that the reason governments choose to place government bodies at arms length, and give them considerable autonomy over Crown affairs is because of the kind of decision making they are forced to do - decision making often involving "choosing between irreconcilable demands". To rationalize, as Justice La Forest had, that such bodies were not part of government because of their degree of autonomy, could then be opportunistically viewed by government as a way of avoiding many Charter challenges, i.e. by creating government bodies that were kept at arms-length. Such a restrictive application of the control test, she said:

> risks leaving open to government the option to delegate wide powers to arms length agencies and then to insulate those bodies from Charter review by limiting government involvement in those bodies' day-to-day decision making process (p.97).

Furthermore, Justice Wilson said, while academic freedom was a major feature of universities, the focus of that freedom was quite narrow. While it protected against the censorship of ideas, it was not incompatible with administrative control being exercised by government. In fact, she said, the state exercised considerable control over Canadian universities, in four major areas.

First, funding of "approximately 80 per cent of the operating and capital costs of the university" are met by government, who also fund the university clientele, i.e. the student population through loans and grants. Second, government has "structural control" over universities, as it has created the statutes which establish and "set out in detail the powers, functions, privileges and governing structure of the universities" and it creates the boards which will then "run" the universities. Third, courts are given power, through the process of judicial review, to oversee the universities exercise of its own power, "in order to ensure adherence to the principle of fairness" (p.106).

Finally, she said, provinces "indirectly control a significant amount of university policy". The examples she cited included prior approval of undergraduate programs, accreditation of graduate studies, and the fact that only approved universities could grant degrees. Therefore, while academic freedom accounted for an absence of intervention in some university decisions, the control of the province could be seen as "quite substantial". Thus, Justice Wilson argued universities should be included as part of government under S.32 of the Charter.

Justice Wilson then suggested an alternative approach to the question of whether an entity is a part of government. She favoured using three tests, to be considered together, as opposed to simply using one test - namely that of control. No "one test or approach is a panacea", she stated "... each alone risks missing a range of bodies that it seems to me must be viewed as part of government" (p.103).

Her tests ask:

> 1. Does the legislative, executive or administrative branch of government exercise general control over the entity in question?
> 2. Does the entity perform a traditional government function or a function which in more modern times is recognized as a responsibility of the state?
> 3. Is the entity one that acts pursuant to statutory authority, specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest? (p.103)

These questions taken together, would "identify aspects of government in its contemporary context". Having formulated this three part test, to "identify what constitutes government for the purposes of S.32 of the Charter, Justice Wilson noted that any test used "must be capable of evolving" as government changes over time. Fixed tests fail because they assume that government is a fixed entity, static - "an assumption that is not borne out by an historical and comparative review of government in this and other countries" (p.104).

While Justice Wilson's tests are more fully articulated than Justice La Forest's, and her test seems more completely reasoned, at this time the majority decision is law, and therefore universities will not be considered part of government for Charter purposes (see Lepofsky (1992) for further criticism of the majority's decision in the McKinney case).

Community Colleges - A Part of Government For S.15 of the Charter Purposes

The case of Douglas/Kwantlen Faculty Association v. Douglas College (1990), in which a decision was handed down on the same day as McKinney, canvassed the related issue of whether community colleges should or should not be seen as part of government under S.32 of the Charter.

Justice La Forest distinguished between McKinney and Douglas, again using a control test. Besides having the affairs of the college managed by a government appointed board

> ... The minister may establish policy or issue directives regarding post-secondary education and training, may provide services considered necessary, approves all by-laws of the board and provides the necessary funding ... the college submits an annual budget to the minister. Briefly put, the college is simply a delegate through which the government operates a system of post-secondary education in the province, as its status as a Crown agency makes immediately evident (p.163).

Thus, a college may be seen as being very different from a university. The university might also receive most of its funding from government, but it may act with much more autonomy than a college. Since a college could be seen as being "simply part of the apparatus of government, in both form and in fact" (p.67), it could be considered to be "performing acts of government" in "carrying out its functions". Therefore, the Charter could be seen as applying to their activities.

La Forest went on to state, firstly, that a collective agreement could be seen as law (given that it was entered into by a government agency involved in enacting government policy) and secondly, that an arbitrator, in deciding a grievance under a collective agreement "may apply the Charter and grant the relief sought for its breach" (p.175).

In summary, while many university administrators undoubtedly felt relief at the decision in McKinney, administrators of community colleges and technical institutes must not have been cheered by the Douglas/Kwantlen decision.

Section One of the Charter - Reasonable Limits

Section one of the Charter is one of its key sections, indicating what standard must be used in determining the extent of rights under the Charter. It reads as follows:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Several things are immediately noteworthy about section one; first it offers a guarantee of those rights set out in the Charter, second it indicates that "reasonable limits" can be placed on our rights.

Given that there now exists nearly a decade of judicial interpretation of this section, there is quite an extensive judicial outline as to how it should be interpreted. Not surprisingly, the onus of justification for any limitation of rights is on the government body whose law is being challenged.

The case of Regina v. Oakes (1986) was the case wherein the Supreme Court articulated how section one must be interpreted, and what a government must establish if it wished to have a law which violated Charter rights upheld.

As stated by Chief Justice Dickson:

> The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit in a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.
>
> The rights and freedoms guaranteed by the Charter are not ... absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, S.1 provides criteria for limits on the rights and freedoms guaranteed by the Charter. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society. (p.335)

Thus, section one is, ultimately, the measure of the rest of the Charter. In Charter challenges even when a law is found to violate Charter rights it may nonetheless be upheld as a "reasonable" limit in a "free and democratic society". Case by case the Supreme Court has already, and will continue, to articulate what limits are reasonable and what limits are not - when an individual's rights are seen as subservient to the common good of the community at large.

Oakes informs us that for a law to stand when it is seen as violating Charter rights "two central criteria" must be met. First, the law in question must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom". The law, in other words, must address some very significant issue as the court would not override Charter rights on an issue of petty or trivial importance.

Second, government must establish that the means of restraint chosen "are reasonable and demonstrably justified", by means of a "proportionality test". There are three major components to this test. First:

> The measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.

In the case of Oakes the law being challenged was S.8 of the Narcotic Control Act (1970). It was a "reverse onus" rule which created a burden on an accused found to be in possession of a narcotic to prove that they were not in possession of the narcotic for the purpose of trafficking. In other words, an accused had to disprove their guilt, as opposed to the Crown having to prove that accused guilty.

The Supreme Court said that for the law to survive, there would have to be a "rational connection" between the fact of possession and the presumed fact of possession for the purposes of trafficking. It found no such rational connection to exist, i.e. an individual may well be in possession for personal use, and as a result overturned the law in question.

Second, the Court said, the means of restraint, "even if rationally connected to the objective in the first sense, should impair 'as little as possible' the right or freedom in question" (R. v. Big M Drug Mart Ltd. at p. 352. The court was here citing another case as authority for this concept.)

Third, there must be "a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of "sufficient importance"."(page 337) Chief Justice Dickson noted that the "more severe" the detrimental effects of a measure were, the "more important" the objective must be to justify the law in question as "reasonable and demonstrably necessary".

Since Oakes this two-pronged test has provided Canadian courts with a guide for the balancing of the interests of society with the interests of individuals and groups.

Section 28 - Equality for Both Sexes

In any discussion of how the Charter restrains discrimination on the basis of gender, S.28 must be mentioned.

Section 28 of the Charter states simply:

> Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

At first glance this may seem repetitive of S.15(1) of the Charter, which had already prohibited discrimination on the basis of sex. The two sections are very different in purpose, however. S.15(1) looks 'outward', so to speak. That is, it creates a potential challenge to laws which discriminate wrongfully.

Section 28, on the other hand, looks inward - inward at the protections given by the Charter itself, and ensures they exist equally for both sexes. For example, women have the same right to vote, the same right to be informed about why they are being arrested, and the same right to a fair trial that men do. Thus S.15(1) and S.28 can properly be seen as complementary.

Impact of the Charter on Human Rights Legislation

It is one of the contentions of this thesis that besides the primary benefit of the Charter to Canadian citizens - protection from laws which infringe on guaranteed rights - there has been a secondary benefit, namely how the Supreme Court of Canada has interpreted human rights issues over the past decade.

Gender Issues

Modification of the court's stance on gender issues has been marked, particularly in the following two areas:

Pregnancy

In 1979, in a case called Bliss v. Canada (A.G.) [1979], the Supreme Court of Canada was asked whether S.46 of the Unemployment Insurance Act, 1971, that restricted the eligibility of pregnant women to unemployment benefits, constituted sex discrimination contrary to section 1(6) of the Canadian Bill of Rights, R.S.C.

1970. Section 46 limited the eligibility of pregnant women to pregnancy benefits, to those benefits which were available under S.30. Section 30, in turn, made it more difficult to collect benefits than it was for other sorts of unemployment benefits. For example, to receive S.30 benefits a woman needed ten or more weeks of insurable earnings in the 20 weeks immediately prior to birth, whereas most benefits required only eight weeks of insurable employment in the same time 20 week period.

Justice Ritchie, speaking for the majority of the court, while acknowledging that conditions imposed on women by the legislation were different than those imposed on men, said that "any inequality between the sexes in this area is not created by legislature but by nature" (p.190). He quoted Justice Pratte, from the Federal Court of Appeal, as stating:

> If S.46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women (p.191).

Thus, pregnancy discrimination, the Supreme Court said, was not discrimination on the basis of the sex.

The case of Brooks v. Canada Safeway Ltd. (1989) brought the same issue before the Supreme Court ten years after the decision in Bliss. In Brooks, Safeway's group insurance plan, which provided for longer protection and better benefits than the Unemployment Insurance Act, 1971, was challenged as being in violation of the Manitoba Human Rights Code, S.9(2)(f), which prohibited discrimination on a variety of grounds, among them "sex, including pregnancy, the possibility of pregnancy, or circumstances related to pregnancy".

The challenge in Brooks arose because Safeway's plan specifically excluded pregnant employees from receiving any benefits during what was referred to as the "10-1-6" period. This period consisted of the ten weeks before the anticipated date of birth, the actual birth week, and six weeks after. This exclusion also served as a bar for pregnant women "suffering from non-pregnancy related afflictions" (p.119). The "mere fact of pregnancy" disentitled female employees from receiving "standard compensation" for temporary disability during the "10-1-6" period.

By using unemployment insurance benefits Mrs. Brooks (and the other two appellants) received less money than they would have under the Safeway plan. Mrs. Brooks, for example, received $133.47 weekly from unemployment insurance, as compared to the $188.00 she would have received from the Safeway plan.

There were other distinctions to be made as well, for example, under S.30(1) of the Unemployment Insurance Act, 1971, a female applicant must have commenced work at least forty weeks before the anticipated date of delivery, whereas the Safeway plan entitled employees to full coverage after only three months of employment.

Both the Court of Queen's Bench and the Court of Appeal of Manitoba found against the appellants, based on the earlier case of Bliss. Chief Justice Dickson (as he then was) of the Supreme Court, however, pointed out that:

> Over ten years have elapsed since the decision in Bliss. During that time there have been profound changes in women's labour force participation. With the benefit of a decade of hindsight and ten years of experience with claims of human rights discrimination and jurisprudence arising therefrom, I am prepared to say that Bliss was wrongly decided or, in any event, that Bliss would not be decided now as it was decided then. Combining paid work with motherhood and accommodating the childbearing needs of working women are ever increasing imperatives. That those who bear children and benefit society as a whole thereby not be economically or socially disadvantaged seems to bespeak the obvious. ... It is difficult to accept that the inequality to which Stella Bliss was subject was created by nature and therefore there was no discrimination; the better view, I now venture to think, is that the inequality was created by legislation, more particularly, the Unemployment Insurance Act, 1971. (p.134)

Chief Justice Dickson observed that Safeway's plan had undoubtedly been developed in an "earlier era", an era "when women openly were presumed to play a minor and temporary role in the labour force" (p.135).

Rejecting Safeway's argument that pregnancy-related discrimination was not sex discrimination because not all women became pregnant, Dickson noted that "the capacity to become pregnant is unique to the female gender". The Plan's discriminatory effects thus fell entirely on women. Therefore, the Plan did involve discrimination on the base of sex and that aspect of Safeway's plan could not be maintained any longer.

Having overturned Bliss, in the case of Brooks, on the grounds of discrimination on the basis of sex, Chief Justice Dickson noted that the approach he had used in Brooks in interpreting human rights legislation, had been enunciated by the Supreme Court of Canada in a number of cases since Bliss, cases such as Ontario Human Rights Commission v. Simpson-Sears Ltd., (1985) and Canadian National Railway Co. v. Canada (Canadian Human Rights Commission) (1987).

Sexual Harassment

The case of Robichaud v. Canada (Treasury Board) (1987) was the first case about harassment which appeared before the Supreme Court of Canada. Its importance stems both from its recognition of the seriousness of harassment and in the finding that employers could face liability for harassing activities by employees. Without such liability, Mr. Justice LaForest said, the remedial objectives of human rights legislation would be "stultified". Employer liability would ensure that "education begins in the workplace, in the micro-democracy of the work environment, rather than in society at large" (p.10). Furthermore, it would serve a purpose:

> ... somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions. (p.11)

The case went on to suggest how employers could reduce their liability, namely "... by instituting a scheme to remedy and prevent recurrence" (p.12). An employer with such a scheme would face less liability than an employer without one.

The most recent decision about harassment was rendered by the Supreme Court of Canada in the case of Janzen v. Platy Enterprises Ltd. [1989]. In that case the two complainants had both been waitresses employed by Pharos Restaurant, owned and operated by Platy Enterprises Ltd. prior to laying complaints in 1983 to the Human Rights Commission of Manitoba. They had each been harassed by Tammy Grammas, a cook during evening shifts. He made sexual advances to the two women, touching various parts of their body while they were busy with their duties and could not defend themselves.

Complaints to the Manager, Eleftherois Ahastasiadis, met with an unsympathetic response. One woman resigned and the other was fired. Ms. Janzen testified that her physical and emotional consequences included insomnia, vomiting and an inability to concentrate. Ms. Govereau testified that she "felt dirty", wasn't relaxed, couldn't sleep and couldn't concentrate in class.

At the human rights level, adjudicator Henteloff found that both Janzen and Govereau had been victims of sex discrimination. Based on the case of Robichaud (1987), the adjudicator found Platy Enterprises liable on the principle of vicarious liability. On appeal to the Manitoba Court of Queen's Bench, Justice Monnin agreed with Henteloff that harassment had occurred with both Janzen and Govereau, and that sexual harassment was a type of sex discrimination. He reduced the award for lost wages to Govereau from $3,000 to $500 however, and he reduced exemplary damages to Janzen to $1,000 (from $3,500) and to Govereau to $1,500 (from $3,000).

The case was further appealed to the Manitoba Court of Appeal by Platy Enterprises, with a cross-appeal by Janzen and Govereau on the quantum of damages. Justice Twaddle, of that court, disagreed with the adjudicator on various grounds. He stated that the legislature intended to prohibit differentiation or discrimination, on the basis of "categorial grouping", as opposed to preventing "differentiation between people on the basis of individual characteristics" (p.290). In other words, sexual harassment could be a response to the physical attractiveness of the victim. He concluded that sexual harassment based on the "sex appeal" of the victim did not constitute sex discrimination.

> The gender of a woman is unquestionably a factor in most cases of sexual harassment. If she were not a woman, the harassment would not have occurred. That, however, is not decisive. ...We are concerned with the effective cause of the harassment, be it a random selection, the conduct, or a particular characteristic of the victim, a wish on the part of the aggressor to discourage women from seeking or continuing in a position of employment or a contempt for women generally. Only in the last two instances is the harassment a manifestation of discrimination.

Applying these principles, Justice Twaddle concluded there had been no variation of Section six of the Human Rights Act, and dismissed the argument that the sexual harassment in question amounted to sex discrimination. The evidence suggested, he concluded, that:

> ...The complainants were chosen for the harassment because of characteristics peculiar to them rather than because of their sex. That is not discrimination no matter how objectionable the conduct.

Chief Justice Dickson, of the Supreme Court, strongly disagreed with Justice Twaddle's reasoning and conclusions. Discrimination on the basis of sex, he said, could be defined as "...practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender". (p.295)

Citing various definitions of harassment, Dickson noted that common to all the definitions was "...The concept of using a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of the employees ..." (p.296).

Harassment, in other words, most often would involve an abuse of power, and leave the victim feeling that if he or she complained, they would be punished rather than the harasser. Harassment, however, is not limited to situations where there is a threat of "adverse job consequences", for a refusal to comply. That type of harassment where "the victim suffers economic loss" is simply one form of harassment, albeit a "particularly ugly one". Sexual harassment may also include:

> ... situations in which sexual demands are foisted upon unwilling employees or in which employees must endure social groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour (p.297).

This could be characterized as creating a polluted or offensive atmosphere in the workplace.

Summarizing the situations in which harassment may occur and offering a definition, Chief Justice Dickson said:

> ...I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment (p.298).

While both perpetrators and victims of harassment may be either male or female:

> ...in the present sex stratified labour market, those with the power to harass sexually will predominantly be male and those facing the greatest risk of harassment will tend to be female (p.299).

Having addressed the issue of what sexual discrimination was, Chief Justice

Dickson then addressed the arguments of Manitoba's Court of Appeal; first, that sexual harassment stemmed from personal characteristics of the particular victim, and second, that the prohibition of sex discrimination under Manitoba's Human Rights Act was designed to eradicate only "generic or categorical discrimination" (p.301). (Such an interpretation would mean that if only some female employees were harassed in the workplace, the harasser could not be said to be discriminating on the basis of sex, rather they would have to be seen as reacting to the sexual attractiveness of the victim.)

Chief Justice Dickson rejected both arguments, noting that while:

> ...discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of the individual's personal characteristics, discrimination does not require uniform treatment of a particular group (p.302).

Indeed, he said, if discrimination required identical treatment of all members of a group, human rights legislation would be of little affect, since discriminatory actions would normally affect some, rather than all, members of a group.

Dickson's legal argument seems self-evident. Those with discriminatory intent or sentiment towards given groups will obviously manifest their feelings towards particular members of the group in question. Even the most discriminatory individual could not target all members of a particular group.

The case of Brooks was cited as authority for the fact that discrimination does not require identical treatment of all members of an affected group, given that pregnancy-related discrimination was sex discrimination, even though not all women were pregnant. Just as "only a woman can become pregnant; only a woman could be subject to sexual harassment by a heterosexual male..." furthermore, just as the fact that not all women become pregnant was not a defence in Brooks, so too the fact that not all female employees at the restaurant were harassed was no bar to a charge of harassment. "The crucial fact is that it was only female employees who ran the risk of sexual harassment. No man would have been subjected to this treatment." (p.303)

Justice Twaddle's argument that the sole fact underlying the discriminatory action:

> was the sexual attractiveness of the appellants and to say that their gender was irrelevant strains credulity. Sexual attractiveness cannot be separated from gender. The similar gender of both appellants is not a mere coincidence, it is fundamental to understanding what they experienced. All female employees were potentially subject to sexual harassment by the respondent Grammas. That his

> discriminatory behaviour was pinpointed against two of the female employees would have been small comfort to other women contemplating entering such a workplace. Any female considering employment at the Pharos Restaurant was a potential victim of Grammas and as such was disadvantaged because of her sex (p.303).

Given all of these reasons, the original findings of the adjudicator were upheld and the Manitoba Court of Appeal was overturned.

In summary these two issues of discrimination based on pregnancy and sexual harassment can be used as examples of how, since the introduction of the Charter in 1982, the Supreme Court of Canada has evolved in its interpretation of human rights legislation on gender related issues from a very conservative approach, which tended against findings of discrimination, to a liberal approach which has stressed the protection of individual rights.

Bona Fide Occupational Qualification - Revisited

A further, and final, example of how the interpretation of human rights legislation has modified pursuant to the passage of the Charter, is the concept of a bona fide occupational requirement referred to in Chapter II of this thesis. A bona fide occupational requirement (or qualification) involves an employer establishing that an employee is unable to do a particular job because of age, handicap, etc.

Etobicoke

The case of Ontario Human Rights Commission v. Etobicoke [1982] was the first Canadian case where the Supreme Court discussed the concept, in a case which involved early mandatory retirement for the fire fighters of that city. Mr. Justice McIntyre, speaking for the majority, said that once a complainant had established a *prima facie* case of discrimination, the "only justification" of an employer's action is for them to establish "that such compulsory requirement is a *bona fide* occupational requirement and requirement of the employment concerned" (p.208).

Turning to a definition of *bona fide* occupational qualification, he said:

> ...to be a *bona fide* occupational qualification and requirement, a limitation, such as mandatory retirement at a fixed age, must be imposed honestly in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which would defeat the purpose of the code. In addition, it must be related in an objective sense to the performance of

> the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public (p.208).

In the case of fire fighters, for example, the issue was whether their strength and stamina had declined sufficiently with age that they could no longer perform their jobs without a risk to public safety. In the case of Etobicoke the Supreme Court of Canada decided that the employer municipality had failed to make out its case for a BFOQ, and therefore was liable for damages for lost wages to the affected employees.

O'Malley

The case of Ontario Human Rights Commission v. Simpson-Sears Ltd. (1985) involved a woman who was both an employee of Simpson-Sears Ltd., and, subsequently, a Seventh-Day Adventist, a religion which observes a Saturday Sabbath. Her employer refused to allow her to continue as a full time employee unless she agreed to work Saturday. The legal issue before the Supreme Court of Canada was whether a work requirement which was imposed on all employees for business reasons discriminated against her, inasmuch as compliance required her to act contrary to her religious beliefs. The requirement in question, however, did not affect other members of the employed group.

At stake here was an issue different from an employer practising discrimination, and subsequently demonstrating that it was necessary and defensible as a BFOQ. Rather, this involved an unintentional discrimination where a work rule that was applicable to all employees had a particular adverse impact on some employees because of their beliefs.

Mr. Justice McIntyre, speaking for the majority, noted that intention to discriminate was "not a necessary element of the discrimination generally forbidden in Canadian human rights legislation", (p.13) and that lower courts had therefore been in error in requiring an intent to discriminate. As the judgment notes:

> It would be extremely difficult in most circumstances to prove motive, and motive would be easy to clear in the formation of rules which, though imposing equal standards could create, as in Griggs v. Duke Power Co., 401 U.S. 424 (1970) injustice and discrimination by the equal treatment of those who are unequal (Dennis v. U.S., 339 U.S. 162, at p.184 (1949)) (p.16).

The court then considered the question of adverse effect discrimination. Noting that the concept was of American origin, Mr. Justice McIntyre described it as arising:

> ...where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force (p.18).

A further problem before the court was the fact that there was no concept of a BFOQ with religion, in the case of religion, that is, discrimination was never acceptable. To establish adverse effect discrimination, therefore, might entitle a complainant to an automatic remedy and leave a respondent with no possible defence or response. Again, the court accepted the American concept of "undue hardship", i.e. an employer must establish an attempt to accommodate, short of undue hardship.

> Accepting the proposition that there is a duty to accommodate imposed on the employer, it becomes necessary to put some realistic limit upon it. The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer.

> ... Where direct discrimination is shown the employer must justify the rule, if such a step is possible under the enactment in question, or it is struck down. Where there is adverse effect discrimination on account of creed the offending order or rule will not necessarily be struck down. It will survive in most cases because its discriminatory effect is limited to one person or to one group, and it is the effect upon them rather than upon the general work force which must be considered. In such a case there is no question of justification raised because the rule, if rationally connected to the employment, needs no justification; what is required is some measure of accommodation. Where such reasonable steps, however, do not fully reach the desired end the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment (pp.23-24).

In Mrs. O'Malley's case the Supreme Court of Canada did not feel that Simpson-Sears Ltd. could display the necessary reasonable accommodation. Further, there was no proof of undue hardship to themselves, therefore they owed her the damages that she had sought.

Bhinder

Bhinder was a Sikh who began working for the Canadian National Railway in April, 1974 as a maintenance electrician in its Toronto coach yard. In November, 1978, the C.N. announced that all employees in the Toronto coach yard would be required to wear a hard hat when at work. Bhinder, who as a Sikh was forbidden by his religion to wear anything but a turban on his head, refused, and was subsequently fired.

While the tribunal which heard his case originally found his firing to be discriminatory, the Federal Court of Appeal overturned that finding. They held the rule about hard hats to be a bona fide occupational qualification. Since the hard hat rule was applicable to all employees the court reasoned that it should not be seen as discriminatory; any different effect it had on Bhinder was "incidental, unintended and cannot constitute discrimination" (p.7). Further, the concept of a duty to accommodate was not provided for in the Canadian Human Rights Act, and could not be implied.

Mr. Justice McIntyre, speaking for the majority of the Supreme Court of Canada, noted the similarities between this case and the O'Malley case, but stated that the difference in this case was that section 14(a) of the Canadian Human Rights Act was involved, a section that created a bona fide occupational qualification. The fundamental issue was whether the hard hat rule was, indeed, a bona fide occupational requirement.

Bhinder's argument was that the test should be applied on an individual basis as each case arose, so that what would satisfy the test of a bona fide qualification would vary according to the characteristics of the individual complainant. The C.N., on the other hand, argued that the requirement was a general occupational one.

The court rejected Bhinder's argument, stating that a BFOR was a:

> ... requirement for the occupation, not a requirement limited to an individual. It must apply to all members of the employee group concerned because it is a requirement of general application concerning the safety of employees. The employee must meet the requirement in order to hold the employment. It is, by its nature, not susceptible to individual application (p.12).

Thus, if a condition of employment were found to be a bona fide occupational qualification then "... consequential discrimination, if any, is permitted - or, probably more accurately - is not considered under section 14(a) as being discriminatory" (p.12). On the same reasoning there could be no duty to accommodate such as there was in the O'Malley case. Where a BFOQ exists, the court said, there is "no room for any such duty", because "no discriminatory practice has occurred" (p.15).

In other words, as long as a restraint applied equally to all members of a group, it could not be seen as discriminatory. This sounds very similar to the Aristotelian reasoning considered in Chapter I, that was rejected in the Andrews case.

Christie

The case of Central Alberta Dairy Pool v. Alberta Human Rights Commission (1990) was a challenge to the Supreme Court of Canada out of the Province of Alberta. Mr. Christie was employed by the Central Alberta Dairy Pool, and was a member of the World Wide Church of God. On March 25, 1983, Mr. Christie requested through his supervisor permission to take unpaid leave on Tuesday, March 29 and Monday, April 4, in order to observe two holy days, the latter of which was Easter Monday.

His request for Monday, April 4, was denied, based on the busyness of Mondays at the plant. Milk arrived seven days a week, so Mondays involved the canning of milk which had arrived on the weekend. He chose to miss work on the day in question and was subsequently fired.

Once again the issue before the Court revolved around a BFOQ. The court characterized the respondent's role as being "mandatory attendance on Mondays except in case of illness or other emergencies, religious obligation not being included as an emergency for this purpose" (p.11).

Madam Justice Wilson, speaking for the majority, concluded that the court's findings in Bhinder that the hard hat rule was a BFOR had been incorrect on two grounds. First, she said, the rule was not reasonably necessary for the "efficient and economical performance of the job without endangering the employee, his fellow employees and the general public", (p.24) using the terminology of Etobicoke. The tribunal had found as a fact that failure to wear a hard hat would not affect his ability to work as a maintenance electrician or pose any threat to the safety of his co-workers or to the public, and would only increase the risk to Mr. Bhinder marginally.

Second, she said, the court had reasoned incorrectly that a BFOQ defence applied to cases of adverse effect discrimination. While the "essence of direct discrimination" in employment involves making rules which generalize "about a person's ability to perform a job based on membership in a group sharing a common personal attribute", human rights legislation was based on treating people as individuals.

> The ideal of human rights legislation is that each person be accorded equal treatment as an individual

> taking into account those attributes. Thus, justification of a rule manifesting a group stereotype depends on the validity of the generalization and/or the impossibility of making individualized assessments (p.25).

Thus, a very careful distinction should be made between rules which discriminate directly, and therefore affect all members of a group similarly (early mandatory retirement in Etobicoke would be an example) and rules which seem neutral, but which have an adverse effect on certain members of that group (mandatory working on Easter Monday would be an example). In the second case, the affected individual must be exempted from the rule, unless to do so would cause undue hardship to an employer.

> Either it is valid to make a rule that generalizes about members of a group or it is not. By their very nature rules that discriminate directly impose a burden on all persons who fall within them. If they can be justified at all, they must be justified in their general application. That is why the rule must be struck down if the employer fails to establish the BFOQ. This is distinguishable from a rule that is neutral on its face but has an adverse effect on certain members of the group to whom it applies. In such a case the group of people who are adversely affected by it is always smaller than the group to whom the rule applies. On the facts of many cases the "group" adversely affected may comprise a majority of one, namely the complainant. In these situations the rule is upheld so that it will apply to everyone except persons on whom

> it has a discriminatory impact, provided the employer can accommodate them without undue hardship (pp.26-27).

Where Bhinder was correct, Justice Wilson said, is that accommodation is not a component of a BFOQ test. Thus, where a rule discriminates directly, it can only be defended by the establishment of a BFOQ. Where a rule has an adverse consequence, however, the right response is to "uphold the rule in its general application and consider whether the employer could have accommodated the employee adversely affected without undue hardship" (p.29).

In the Christie case it was reasonable that a dairy which closed down on the weekend would find Monday to be a particularly busy day. The real question, then, was whether accommodation had been made by the employer to the point of "undue hardship". (What constituted undue hardship the Court said, are such factors as cost, morale of other employees, size of the employer's operation and safety.)

Using these concepts, the employer had not made a sufficient effort to accommodate Mr. Christie. As Justice Wilson noted "If the employer could cope with an employee's being sick or away on vacation on Mondays, it could surely accommodate a similarly isolated absence of an employer due to religious